



M e m o r a n d u m

To: Panel Members Date: September 22, 2006

From: Maureen Reilly, General Counsel File:

Subject: REGULATORY ACTION: FRONTLINE WORKER, SOST, TRAINING SCHEDULE

Staff proposes that the Panel amend the definition of “frontline worker” at Title 22, California Code of Regulations Section 4400(ee) in conformity with federal and state labor law governing the exempt status of employees. Staff also proposes that the Panel repeal the standards for Structured On-Site Training (SOST) at Section 4425 because that type of training is no longer funded by ETP; and, repeal the standards for a Training Schedule at Section 4441.5 because that schedule is no longer required by ETP.

Amend Section 4400(ee) on Frontline Worker.

This regulation establishes three methods of determining when a worker is directly producing or delivering goods/services.¹ The two methods in Subsections (1) and (3) refer to whether the worker is exempt from overtime, as shown in full below:²

(1) is not exempt from overtime under state or federal law, providing he/she directly produces or delivers goods or services.

(3) is exempt from overtime under state or federal law and not covered by a collective bargaining agreement if his or her primary job responsibility is directly producing or delivering goods or services.

...

These two methods should be amended for purposes of clarity and conformity with the body of federal and state labor law that determine exempt status. Exempt status is important because it means the employee is not eligible for overtime. This body of law is construed in favor of eligibility as a protection for workers.

Subsection (1) provides that a worker is “frontline” if not exempt under state or federal law. It should be amended to remove the possibility of exemption under federal law only, since state law is stricter. In addition, it should identify the “more than half” guideline used by the state Division of Labor Standards Enforcement (DLSE).³

¹ Subsection (4) is a cross-reference to Special Employment Training for a small business owner with less than 10 full-time employees, under T.22, C.C.R. Section 4409(c). It is not proposed for amendment because it is accurate.

² Subsection (2) is not proposed for amendment because it accurately repeats the statutory standard and coverage by a collective bargaining agreement is a simple and useful way to determine exempt status.

³ The more than half time standard is an aspect of state law, not federal. Since it is more stringent, it is governing.

Under both federal and state labor law, the employee's actual job duties, not job title, is used to determine exempt status. There are a variety of standards for different types of jobs such as administrators, managers, sales staff and professionals (i.e., attorney, computer programmer).

To qualify for exempt status, administrators and managers must "customarily and regularly" exercise discretionary powers in performing their job duties. Under state law, this standard has been interpreted to mean the employee must be "primarily engaged in" such duties for more than half of the time. (DLSE Enforcement Manual at Sections 51.1 and 51.2.) Thus, if a trainee directly produces or delivers goods or services for more than half the usual workweek, he or she is a frontline worker.

We recommend modifying Subsection (1) to remove the possibility of determining exempt status based only on the less-stringent federal law. Also, to include the "more than half" state standard for purposes of clarity.

Subsection (3) provides that a worker is exempt if he or she directly produces or delivers goods or services. This definition conflicts with the meaning of exempt status under both federal and state labor law. Actually, a worker is not exempt if he or she produces or delivers goods or services. Since the rest of Subsection (3) is redundant, we recommend deleting it entirely.

Repeal Section 4425 on Structured On-Site Training.

This regulation, enacted in 1995, sets parameters for Structured On-Site Training (SOST). These parameters were designed to limit the extent to which trainees would be directly producing goods or services during SOST. However, even with these parameters in place, the Panel had concerns over the problems inherent in this method of training delivery and whether its funds were being put to the best use.

Given these concerns, the Panel imposed a moratorium on SOST funding in August 2002 and retained researchers at California State University, Northridge (CSUN) to study this method of delivery. The CSUN report, which was released to the Panel in February 2003, identified the following problems: 1) SOST funding often supports normal supervision activities; 2) employers use unstructured coaching, mentoring and coaching instead of structured training; 3) contract administrators focus on trainer hours rather than training competencies; 4) accurate monitoring is difficult; and 5) SOST funding is often unrelated to the actual cost of training delivery; and 6) the cost is often above market as compared to classroom training. (Memo to the Panel Members dated February 27, 2003.)

Based on this report, the Panel continued the moratorium on SOST, and has not lifted it since. However, the Panel now recognizes the cost of providing structured on-the-job training that is tied to classroom training as in-kind employer contributions.

In short, SOST is no longer being funded, nor is it likely to be funded in the foreseeable future.⁴ Thus, Section 4425 is no longer necessary and should be repealed.

Repeal Section 4441.5 on Training Schedule.

This regulation, enacted in 1998, requires a “detailed roll out schedule” for the first six months of training that must be available at the start of training and updated throughout the project, subject to monitoring by ETP. However, contractors must have the flexibility to adjust their training schedules as their projects progress. It has been staff’s experience that a detailed six-month schedule is not always practical or even necessary at the start of training. Instead, ETP staff has been working closely with potential contractors to develop a realistic schedule that takes into consideration business production needs and cycles.

In so doing, staff emphasizes that training must be completed in time to meet retention requirements for all trainees, and other factors unique to the ETP program. Also, staff continues to provide guidance as part of their ongoing monitoring duties. In short, Section 4441.5 is potentially confusing because it conflicts with actual practice; and is unnecessary because staff provides guidance to contractors on creating and maintaining a realistic training schedule as part of the development and monitoring process. For these reasons, Section 4441.5 should be repealed.

The strikeout-and-underline text of the proposed amendment to Section 4400(ee) is attached. The strikeout text of Sections 4425 and 4441.5 is also attached.

If you approve these proposed regulatory actions, they will be noticed for a 45-day public comment period through the Office of Administrative Law. The full rulemaking process takes about 90 days to complete.

Recommendation: Approve the amendment of T.22, C.C.R. Section 4400 and the repeal of Sections 4425 and 4441.5, as set forth herein with reference to the attached text.

⁴ Should the Panel decide to begin funding SOST again, the parameters should be reevaluated based on prior experience and a new regulation could be enacted with revised parameters.

4400. Definitions.

~~As used in Sections 4400-4450, inclusive, of these regulations:~~

- (ee) "Frontline worker" means an individual who is primarily engaged in the direct production or delivery of goods or services, as determined by ~~meets one of one of the following two criteria:~~
- ~~(1) Is not exempt from~~ The individual is primarily engaged in job duties that do not qualify for exemption from overtime under state or federal law; or, providing he or she directly produces or delivers goods or services.
 - ~~(2) The individual is covered by a collective bargaining agreement; or, providing he or she directly produces or delivers goods or services.~~
 - ~~(3) Is exempt from overtime under state or federal law and not covered by a collective bargaining agreement if his or her primary job responsibility is directly producing or delivering goods or services.~~

Job duties will not qualify for exemption from overtime if the individual is directly producing or delivering goods or services more than half the time during his or her usual workweek.

- ~~(4) For purposes of Special Employment Training projects, a frontline worker may also be the owner (a) of a business with at least 1, but less than 10 full-time employees, and (b) whose primary duties consists of directly producing or delivering goods or services.~~

For purposes of Special Employment Training projects a frontline worker may also be the owner of a business with at least one but less than 10 full-time employees, whose primary duties consist of directly producing or delivering goods or services.

Authority: Section 10205(m), Unemployment Insurance Code.

Reference: Sections 10200, 10201(c), (f), (g), (h), (i), (l), 10202, 10202.5, 10203, 10204(b), 10205, 10206(a)(1)(C), (a)(2), (3), 10207(a), 10209(a), (b), (d), (e), (f), (g), 10210(a), 10211, 10212.2(a), (b), 10213, 10213.5(b), 10214.5(a), Unemployment Insurance Code.

~~4425. Structured On-Site Training.~~

~~(a) Structured, on-site training (SOST) shall provide for the acquisition of skills on the job.~~

~~(1) When included in a training program, SOST shall follow classroom and/or laboratory instruction.~~

~~(2) SOST shall be supervised by an individual with a demonstrated competency in the subject area, who is not simultaneously enrolled in the same training group.~~

~~(3) SOST shall follow a planned methodology for the delivery of job tasks and specify the minimum competencies to be gained.~~

~~(A) The contractor shall identify the minimum competencies necessary to perform the job and develop the curricula that identifies the tasks and duties to be trained.~~

~~(B) The contractor shall develop a SOST monitoring plan detailing how the SOST training provider will monitor the trainee's progress by observing, assessing and documenting the completion of each task.~~

~~(b) No funding shall be authorized for SOST hours under a literacy training program.~~

~~(c) The Panel shall reimburse SOST as follows:~~

~~(1) Frontline workers: Two (2) hours of SOST for every hour of classroom/laboratory training, except for training in Sales Techniques and Customer Service training which shall be limited to one (1) hour of SOST for each hour of classroom/laboratory training.~~

~~(2) Managers/Supervisors: One (1) hour of SOST for each hour of classroom/laboratory training. This limitation for managers/supervisors does not include a line supervisor with direct supervisory responsibility for frontline workers if that line supervisor is being trained in front line skills.~~

~~The ratios specified in paragraphs (1) and (2) above shall be applied to the total number of training hours per trainee according to the type of training. The Panel may authorize curricula that varies from the prescribed ratios upon presentation of written justification from the contractor during contract development.~~

~~Authority: Section 10205(c), Unemployment Insurance Code.~~

~~Reference: Sections 10201(l), (j), and 10209(b), Unemployment Insurance Code.~~

~~Effective: December 1, 1995~~

~~4441.5 Training Schedule.~~

~~(a) A training schedule acceptable to the Panel shall be in place at the start of training. The training schedule shall include both a detailed roll out schedule for at least the first six months of training by types of training and job groups, and a summary roll out schedule for the remainder of the term of the Agreement.~~

~~(b) The training schedule must be maintained current and updated periodically, subject to review and approval of the monitoring analyst. The contractor shall notify the Panel of any significant changes in the training schedule prior to implementation of those changes.~~

~~Authority: Section 10205(l), Unemployment Insurance Code.~~

~~Reference: Section 10205(c), Unemployment Insurance Code.~~

~~Effective: May 18, 1998~~